

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID WILLIAM SCHAEFER,

Defendant-Appellant.

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UNPUBLISHED

October 6, 2005

No. 245175

Wayne Circuit Court

LC No. 02-004291

ON REMAND

Before: Borrello, P.J., White and Smolenski, JJ.

PER CURIAM.

This case is before us for the second time, on remand from the Supreme Court. See *People v Schaefer*, 473 Mich 418; \_\_\_ NW2d \_\_\_ issued July 27, 2005 (Docket No. 126067). The underlying facts are set forth in our initial opinion, *People v Schaefer*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2004 (Docket No. 245175). In our first opinion, we affirmed defendant's negligent homicide conviction, and reversed his conviction of operating a motor vehicle while under the influence of liquor (OUIL) causing death, finding that the court's instruction on OUIL failed to adequately set forth the causation element. The Supreme Court vacated the judgment and remanded to this Court with the instruction to address defendant's argument "that the trial court erred so as to require reversal in making repeated references to defendant's stipulation as to his 0.16 blood-alcohol level during the jury instructions." In a footnote, the *Schaefer* Court provided the following instruction:

Because we conclude that the trial court's other instructional errors were harmless, the Court of Appeals is to consider on remand only whether the trial court's multiple references to the stipulation constituted error requiring reversal—i.e., that a "miscarriage of justice" occurred, as required by MCL 769.26 and *Lukity*. If the Court of Appeals determines that no "miscarriage of justice" occurred, defendant's conviction of OUIL causing death is to be affirmed. [473 Mich at 445, n 81.]

On remand, we affirm.

MCL 769.26 provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of

misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Defendant objected to the error complained of in a timely manner, and articulated the basis for the objection. Thus, the claimed nonconstitutional error was properly preserved. *Schaefer*, slip op at 30. A preserved nonconstitutional error is presumed to be harmless. The error justifies reversal if it is more probable than not that it determined the outcome of the case. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). An error is not outcome determinative unless it undermined the reliability of the verdict in light of the untainted evidence. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

A directed verdict of guilt in a criminal trial is forbidden by the Sixth and Fourteenth Amendments. US Const, Ams VI, XIV. An instruction that amounts to a directed verdict, or otherwise invades the province of the jury, constitutes error mandating reversal. *People v Gaydosh*, 203 Mich App 235, 237-238; 512 NW2d 65 (1994).

Defendant argues that he was denied a fair trial by the trial court's repeated reference while instructing the jury that the parties had stipulated that he had a BAC of 0.16%. Defendant contends that by repeating this information, the trial court essentially directed a verdict on the driving while intoxicated element of the charge of OUIL causing death. We conclude that the trial court's reference to the parties' stipulation did not result in a miscarriage of justice.

In order to establish that defendant operated a vehicle while intoxicated, the prosecution was required to establish that defendant operated a vehicle while under the influence of intoxicating liquor, or that defendant operated a vehicle while having a blood-alcohol content (BAC) of 0.10% or more. MCL 257.625(1). The parties stipulated that three hours after the accident occurred, defendant had a BAC of 0.16%. The trial court reminded the jury of this stipulation while instructing on the elements of OUIL causing death, but also properly informed the jury that it was entitled to either accept or reject the stipulation. See CJI2d 4. The trial court's repeated reference to the parties' stipulation did not direct a verdict on the operating a motor vehicle while intoxicated element of OUIL causing death, and did not deny defendant a fair trial.

Further, on the entire record we conclude that there was ample evidence of guilt apart from the stipulation (which is not itself attacked on appeal, but only the repeated references to it). There was evidence that prior to the accident defendant drove his vehicle in an erratic manner, tailgated a vehicle on the freeway, and at the last minute swerved to exit the freeway. A police officer who spoke with defendant following the accident stated that defendant smelled of intoxicants and slurred his words. No miscarriage of justice occurred. MCL 769.26; *Lukity*, *supra*.

Affirmed.

/s/ Stephen L. Borrello

/s/ Helene N. White

/s/ Michael R. Smolenski